



Office of the Attorney General
State of Texas

January 3, 1997

DAN MORALES
ATTORNEY GENERAL

Mr. Randall C. Stump
Stump, Stump & Stump
P.O. Box 286
Georgetown, Texas 78627

OR97-0009

Dear Mr. Stump:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 102820.

The City of Bartlett (the "city"), which you represent, received a request for "a list of attorneys/law offices and consulting firms (with copies of their fee statements) retained by the City of Bartlett for the past 2 years." You assert that the requested information is excepted from required public disclosure by sections 552.101, 552.102, 552.103, 552.107 and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted documents.

You state that a list of the requested attorneys does not exist. The Open Records Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 (1986) at 3. However, a governmental body must make a good faith effort to relate a request to information which it holds. Open Records Decision No. 561 (1990). You have, therefore, submitted five categories of attorney fee bill statements that you assert may be withheld from disclosure. Each category of statements, labeled exhibits B-F, concern a separate matter.

You first claim that all of the requested fee bills are excepted from disclosure by section 552.101 of the Government Code. You claim that under Open Records Decision numbers 304 (1982) and 339 (1982), the "attorney-client privilege" makes the documents confidential by law and excepted from disclosure by section 552.101. Open Records Decision numbers 304 (1982) and 339 (1982) have been overruled. Open Records Decision Nos. 589 (1991), 574 (1990). Thus, although you claim that section 552.101 excepts the information from disclosure pursuant to the attorney-client privilege, the attorney-client privilege is properly claimed under section 552.107 of the Government Code. Open Records Decision No. 574 (1990) at 2.

Secondly, you claim that the documents may be withheld according to the "work product privilege" under section 552.101. This office recently stated that if a governmental body wishes to withhold attorney work product, the proper exception to raise is either section 552.103 or section 552.111. Open Records Decision No. 647 (1996). We announced in Open Records Decision No. 647 (1996) that a governmental body must show that the work product (1) was created for trial or in anticipation of litigation under the test articulated in *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993), and (2) consists of or tends to reveal the thought processes of an attorney. *Id.* at 5. The city has not made either of these demonstrations. Accordingly, the city may not withhold the requested information from disclosure based on section 552.111.

You next claim that material within the documents is excepted from disclosure by section 552.102. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the act. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1. This office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), and personal financial information not relating to the financial transaction between an individual and a governmental body. After reviewing the materials in exhibits B-F, we do not believe that the city may withhold any of the information because of common-law privacy.

You also contend that exhibits B, D, and E are excepted from disclosure by section 552.108. Section 552.108 excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime," and "[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution." Gov't Code § 552.108; *see Holmes v. Morales*, 924 S.W.2d 920 (Tex. 1996). In this instance, you claim that the requested records potentially involve criminal matters. You do not indicate, however, whether the proper law enforcement agency wishes to withhold the fee bill information or whether any criminal prosecution has resulted. *See, e.g.,* Open Records

Decision Nos. 474 (1987), 372 (1983) (where incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information which relates to incident), Open Records Decision 586 (1991) (need of another governmental body to withhold requested information may provide compelling reason for nondisclosure under section 552.108). We do not believe that the exception applies to these documents, revealing only inconsequential information pertaining to the matters worked on by city attorneys and the amounts billed for them. We believe such information only indirectly "deals with the detection, investigation, or prosecution of crime" and more directly deals with the expenditure and payment of public funds. Open Records Letter Ruling 96-1329 (1996). Therefore, the city may not withhold the requested information under section 552.108 of the Government Code.

We next address your arguments under section 552.103. Section 552.103(a) excepts from disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The city must meet both prongs of this test for information to be excepted under 552.103(a). Because the fee bills involve different matters, you have asserted five separate actions to show anticipated or pending litigation for each of the categories of statements. We will address them separately.

For exhibit B, you claim that the city is investigating possible misappropriation of funds. You state that if wrongdoing is discovered, the city will sue to recover the funds. We do not believe that you have shown that litigation is reasonably anticipated in this matter. Open Records Decision No. 557 (1990) (mere contemplation of bringing civil action when governmental body has not yet done so does not satisfy reasonably anticipated litigation prong of section 552.103). You next state that exhibit D concerns a matter where the potential opposing party has threatened litigation. You have submitted a letter concerning improper transformer installation as evidence of the anticipated litigation. The letter appears to be a notice of claim. Under Open Records Decision No. 638 (1996), this office

determined how a governmental body must establish reasonably anticipated when relying solely on a claim letter. We stated that the governmental body must (1) show that it has received a claim letter from an allegedly injured party or his attorney and (2) state that the letter complies with the notice of claim provisions of the TTCA or applicable municipal statute or ordinance. You have submitted a letter to this office for review which appears to be a notice of claim; however, you do not represent that the notice letter complies with the TTCA or applicable municipal statute or ordinance. We conclude, therefore, that you have not met your burden of showing that litigation is reasonably anticipated for purposes of section 552.103(a). Open Records Decision No. 638 (1996). As for Exhibit D, you have provided this office with the petition in a pending civil action, *Holt v. City of Bartlett, et al.*, No. 13,053 (27th Dist. Ct., Lampasas County, Tex., Oct. 25, 1996). We conclude that litigation is pending and that portions of exhibit D relate to the litigation. You finally argue that exhibits E and F involve a discrimination complaint against the city and city employees. You have shown that a complaint has been filed with the Equal Employment Opportunity Commission. We conclude, therefore, that the city has shown that litigation is reasonably anticipated for this matter. Open Records Decision No. 336 (1982). After reviewing exhibits E and F, we also conclude that a portion of the information relates to that anticipated litigation.

The city may, therefore, withhold the portions of exhibits D, E, and F that are related to the anticipated or pending litigation. We have marked those parts of exhibits D, E, and F that the city may withhold under section 552.103. The city may not withhold any of the information in exhibits B and C under section 552.103. Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated or pending litigation is not excepted from disclosure under section 552.103(a). Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Lastly, you contend that the requested information is protected from disclosure by section 552.107. Because we have already determined that section 552.103 protects most of exhibits D, E, and F from disclosure, we need only consider your arguments under section 552.107 for exhibits B and C. In this case, section 552.103 protects more information than would section 552.107. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* After reviewing exhibits

B and C, we find only one portion that reveals either confidential communications from the client to the attorney or the attorney's legal advice or opinions. We have marked the line in exhibit C that may be withheld pursuant to section 552.107. All other information in exhibits B and C must be disclosed.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in cursive script that reads "Don Ballard".

Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref: ID# 102820

Enclosures: Submitted documents

cc: Ms. Vyki Robbins
P.O. Box 221
Bartlett, Texas 76511
(w/o enclosures)